No. 14.

therefrom. It was duplied for Morphie, That there being no writ to instruct any interest of Beattie's, but the reposition granted by Ethie, bearing in the narrative of it, that Beattie's assignation to him was in trust, that being after both back-bonds, there was then no right acquired to Beattie, but Ethie might discharge or alter the back-bond as he pleased; and therefore Ethie's acceptance of the second back-bond is as effectual as if he had subscribed it; and though it bears a clause, but derogation of the back-bond, that general clause cannot take away the effect of a special clause subjoined, which is truly a derogation of the first back-bond, limiting Beattie's payment to be out of the superplus of the lands, and therefore the general clause is but like *protestatio contraria facto*, and is only to be understood, *but* further derogation to the first back-bond, than what is particularly expressed in the second.

The Lords found that Ethie standing in the right of the assignation without any anterior writ to instruct the trust in favours of Beattie, that he might derogate by accepting the bond of corroboration, and that he had derogated thereto, as to the nature of payment, notwithstanding of the general clause, but derogation.

Stair, v. 2. p. 231.

1675. *January 5.*

EARL of NORTHESK *against* The LAIRD of PITTARRO.

No. 15.

The duty involved in a trust found not to oblige the person entrusted to pay more, than as much as might have been recovered by the right entrusted.

The Earl of Northesk having charged Pittarro for £.2,000 contained in his bond, he suspended on compensation, as having obtained assignation from Catharine Carnegy to the sum of £.1000, and to Northesk's back-bond, bearing, "That he having received assignation from Catharine and her husband, and thereupon had with several other sums of his own apprised the lands of Craig their common debtor, therefore he obliged himself so soon as he should recover payment of the said apprising, he should pay the said Catharine;" and true it is, that Northesk hath disponed this apprising to Hatton, and so must be presumed to have gotten payment, otherwise he would have reserved this right, or disponed it with burden of the back-bond. It was answered, That albeit Northesk hath disponed the apprising, he cannot be liable, unless in the terms of his back-bond he had gotten payment, which no presumption can infer, *quæ cedit veritati*; the agreement betwixt him and Hatton is produced, by which it appears that there were anterior rights upon Craig's estate wholly exclusive of this apprising, and that all he got was upon the account of his anterior rights; neither is this liquidated how far the said Catharine could have interest. It was replied, That the back-bond cleared that Northesk's name was but in trust, and that at no time he could refuse to denude himself, unless he had paid the sum, and now he cannot denude, because he is already denuded, without reservation or burden of the back-bond. It was duplied, That to denude is *factum*, and no ground of compensation, and it now being *factum imprestabile*, he can only be liable for damage and interest. It

was triplied, That the fact became imprestable by his own deed, and therefore he cannot put the party truster to dispute the validity of their rights when he hath put the same away, as was found in the case of Janet Watson against Mr. Walter Bruce, No. 70. p. 3537. *voce* DILIGENCE. No. 15.

The Lords found, that in so far as the Lord Northesk had received benefit, or might have received benefit by the said apprising as to this debt, and in so far as the entruster was damnified, which could be instructed and liquidated *instanter* in this process, the Lords would sustain the same in compensation, and no further.

Stair, v. 2. p. 300.

1677. *July 25.* EARL of WINTON *against* The MARQUIS of DOUGLAS.

No. 16.
In what manner modification and restriction of a trust are to be proved?

The Earl of Abercorn having disponed the lordship of Paisley to the Earl of Angus, he gave back-bond to employ the price of the lands for relief of himself and the Earl of Winton of their cautionry. The Earl of Angus having thereafter sold the lands to the Earl of Dundonald for £.160,000; Winton pursues the Marquis of Douglas as heir to his father the Earl of Angus, for relieving him from paying of £.8,000 for the Earl of Abercorn. There is produced a disposition to Dundonald, bearing £.50,000 received by Angus. and £.110,000 detained by Dundonald, to purge real incumbrances. The defender alleged that he could only be liable for £.50,000 received by his father, and that the remainder was employed for real incumbrances, as is expressed in the disposition, whereof the pursuer makes use as a probation for him, and therefore must admit of it as a probation against him. It was answered, That if the Earl of Angus had deponed in the terms of this disposition, his oath would have proved against him as to the receipt of £.50,000, but would not have proved for him, that he had allowed £.110,000 for real incumbrances, but it would have been rejected as an extrinsic quality, and he put to prove it; much more must this hold in his writ, otherwise if the disposition should acknowledge that all was detained for real incumbrances, that naked assertion of a party should have freed himself from counting.

The Lords found that the pursuer might make use of this disposition, for proving against the defender the price, and his father's intromission, and that the defender behoved to instruct the real incumbrances that were on the estate, and did grant diligence against Dundonald and others for proving the same.

Stair, v. 2. p. 548.